

Wiggle Room: Rethinking Reservation Values in Negotiation

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I. INTRODUCTION

Although it values preparatory introspection, the literature on interest-based negotiation focuses especially on negotiation with others. But, figuratively speaking, we each continuously negotiate with ourselves¹ as we negotiate with others who are doing the same. I aim to name, explain, and systematize “wiggle room,” a phenomenon that lies within these linked self-negotiations.

Consider the following thought experiment. You are a plaintiff negotiating the settlement of a civil lawsuit. Before settlement talks began a year ago, you decided you would not accept less than \$2 million. This threshold is what some would call your “reservation value,” traditionally defined as the least you are willing to accept—or, if on the other side of the bargaining table, the most you are willing to give.² Suppose you arrived at this \$2 million figure through careful analysis, including your lawyer’s estimations of the probabilities of various possible verdicts. This accounted for all conceivable contingencies, benefits, and costs, along with your preferences, biases, and needs. Then, six months ago, you discovered some new evidence and shared it with defense counsel. It led you to recalibrate your reservation value to \$2.5 million, but defense said their last best offer is \$2.49 million. Since then, nothing has changed. Today, your case will be heard in court, and you are walking up the courthouse steps. All posturing aside, would you settle for less than your new reservation value?

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¹ See generally GEORGE AINSLIE, *PICOECONOMICS: THE STRATEGIC INTERACTION OF SUCCESSIVE MOTIVATIONAL STATES WITHIN THE PERSON* (1992); GEORGE AINSLIE, *BREAKDOWN OF WILL* 73–142 (2001).

² E.g., HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION: HOW TO RESOLVE CONFLICTS AND GET THE BEST OUT OF BARGAINING* 45 (1982) [hereinafter RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION*].

From personal experience in legal and extralegal contexts, we know that we sometimes cross a line we drew in the sand. People can sometimes be dragged past their reservation value, agreeing to a deal or agreement that does not meet it, much less surpass it. I call this possibility “wiggle room,” and acceptance of an agreement that fails to meet one’s reservation value “wiggling.”

This paper will not try to prove that wiggling happens or argue whether it is advisable. I will begin instead with an overview of what the interest-based negotiation literature has to say about wiggling. There, I will dwell on the tension between Howard Raiffa and Roger Fisher’s treatments of reservation values. Raiffa’s treatment is more enthusiastic; Fisher’s, leery. I will stake out the middle ground as I develop a quantitative and graphical model of wiggle room. To do that, we will need an adequate vocabulary, so I will start by re-examining keystone concepts of negotiation analysis, recasting some in light of wiggle room’s occasional existence—a fact these concepts have so far ignored. I will then mount what appears to be the first systematic and thorough examination of wiggle room’s causes within the context of negotiation, drawing especially from psychology, negotiation analysis, and behavioral economics. I will collect and induce predictions about which tactics are likely to be the most effective at creating wiggle room during distributive bargaining, as well as offer advice about how, if desired, we can help steel ourselves against the temptation to wiggle. In the process, I will highlight anything that confirms or disproves the tacit and explicit assumptions I surface in Fisher’s and Raiffa’s respective lines of thought.

II. PRELIMINARY LITERATURE REVIEW

The interest-based negotiation literature is already well-aware of recalibrations like the considered shift, in the thought experiment, from \$2 million to \$2.5 million—in light of new events, information, or strategic moves at or away from the table, negotiators might need to recalibrate their reservation value.³ New offers, changes in perception, and threats are a few such occasions.⁴ Wiggle room pertains not to your recalibration from \$2

³ *E.g.*, DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 120–21 (1986) [hereinafter LAX & SEBENIUS, *MANAGER AS NEGOTIATOR*]; DAVID A. LAX & JAMES K. SEBENIUS, *3D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS* 81–90 (2006) [hereinafter LAX & SEBENIUS, *3D NEGOTIATION*].

⁴ LAX & SEBENIUS, *MANAGER AS NEGOTIATOR*, *supra* note 3, at 120.

million to \$2.5 million due to the important new evidence, though, but to whether you would accept \$2.49 million on the courthouse steps, all other things being equal. What is the difference?

One factor that distinguishes wiggle room is the span of its cause's effects. In the thought experiment, the new evidence meaningfully (even if not uniformly) impacts the state of play for all parties. If exasperation is what leads you to capitulate on the courthouse steps, that is wiggling, because it was not caused by something that impacted the state of play for everyone in the same way as the new evidence. Another distinguishing factor is whether information that causes recalibration can be classed as a kind of hearsay, bluff, or say-so. Suppose that on the courthouse steps the defense presents only good acting skills, drawing upon an aggressive mien, strong language, unsubstantiated claims that you have no attractive alternatives, and unsubstantiated threats about how willing they are to try the case. If that is what leads you to accept less than your reservation value, you wiggled. In this sense, some instances of wiggling are a subset of recalibration.

Some of what I want to call wiggling is less deliberate than "recalibration" would suggest. A buyer at an auction who impulsively blurts out a number above his reservation value without thinking wiggled. So wiggling and recalibration are like overlapping Venn diagrams. Indeed, I am not sure it is possible to distinguish every kind of situation that counts as wiggling, but I hope the two constraints above are enough to prevent the concept from being so broad as to be trivial. With this refined definition in mind, we can resume the literature review with sharper focus.

The negotiation literature's treatment of what I am calling wiggle room can be divided into descriptions and prescriptions. The descriptive account is scattered. Raiffa et al. mention wiggling hypothetically⁵ and anecdotally⁶ as an interesting anomaly. They also admit that for negotiations over packages of issues, reservation values might be a range of values rather than just one.⁷ Lax and Sebenius mention that in practice, "reservation values and aspirations sometimes have a lot of give"⁸ because (1) they can depend partly on counterparts' reservation values and aspirations, about which we are often uncertain, and (2) experiments on psychological "limits" suggest "a

⁵ HOWARD RAIFFA ET AL., *NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING* 167–68, 274 (2002) [hereinafter RAIFFA ET AL., *NEGOTIATION ANALYSIS*].

⁶ *Id.* at 119.

⁷ *Id.* at 222.

⁸ LAX & SEBENIUS, *MANAGER AS NEGOTIATOR*, *supra* note 3, at 135.

bargainer without a limit [i.e., reservation value] seems totally plausible, especially in the early phases of the negotiation.⁹¹⁰ Wiggle room has to do with the violation of reservation values that were clearly defined, though, not with those that were undefined in the first place. Thompson has offered a few definitions of something she calls agreement bias. It appears to refer to some parties' tendency—one confirmed by Pinkley, Neale, and Bennett¹¹—to accept agreements worse than their best alternative to a negotiated agreement (BATNA), not necessarily their reservation value.¹² However, White and Neale discuss exactly what I am calling wiggle room,¹³ and Wheeler suggests that some negotiations in professional sports practically assume it.¹⁴ I will review their input when I catalogue wiggle room's possible causes.

Outside of the negotiation literature, one concept that should not be confused with wiggle room is what Herbert Simon called satisficing. That is when, due to their bounded rationality, decisionmakers settle on suboptimal decisions that merely suffice because they meet known criteria or a predecided threshold.¹⁵ Wiggle room involves accepting agreements that do

⁹ DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* 27 (1981).

¹⁰ LAX & SEBENIUS, *MANAGER AS NEGOTIATOR*, *supra* note 3, at 135.

¹¹ Robin L. Pinkley et al., *The Impact of Alternatives to Settlement in Dyadic Negotiation*, 57 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 97, 110–12 (1994). This study's data is not available for re-analysis. Email from Robin Pinkley, Professor at the Edwin L. Cox School of Business, to Noah Susskind, author (Mar. 30, 2010, 20:18 EST) (on file with author).

¹² See LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 5, 230 (4th ed. 2008) [hereinafter THOMPSON, *MIND AND HEART*]; LEIGH L. THOMPSON, *THE TRUTH ABOUT NEGOTIATIONS: "CRACK THE CODE, AND USE IT WITH ANYONE AT ANY TIME . . ."* 25 (2d ed. 2008) [hereinafter THOMPSON, *THE TRUTH ABOUT NEGOTIATIONS*]; Taya Cohen et al., *The Agreement Bias in Negotiation: Teams Facilitate Impasse*, IACM 23rd Annual Conference Paper, available at SSRN: <http://ssrn.com/abstract=1612404>. The last-mentioned also overlooks the plausible possibility that "agreement bias" is just as prevalent among team-members as it is across the bargaining table. Email from Lawrence Susskind, Professor at the Massachusetts Institute of Technology, to Noah Susskind, author (Aug. 12, 2010, 17:07 EST) (on file with author).

¹³ Sally Blount White & Margaret A. Neale, *Reservation Prices, Resistance Points, and BATNAs: Determining the Parameters of Acceptable Negotiated Outcomes*, 7 *NEGOTIATION J.* 379, 379 (1991).

¹⁴ Michael Wheeler, *First, Let's Kill All the Agents!*, in *NEGOTIATING ON BEHALF OF OTHERS: ADVICE TO LAWYERS, BUSINESS EXECUTIVES, SPORTS AGENTS, DIPLOMATS, POLITICIANS, AND EVERYBODY ELSE* 235 (Robert H. Mnookin et al. eds., 1999).

¹⁵ HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY: ECONOMIC ANALYSIS AND PUBLIC POLICY* 1, 295–98 (1984).

not even meet our predecided threshold. More relevant but less well-known is a philosophical essay by Donald Davidson investigating the assumptive and future-oriented nature of intention.¹⁶ Most relevant is an array of research studies on the psychology of choice-making, decisions, persuasion, biases, and—a topic somewhat underexplored by the negotiation field—self-control. I will help unfold this descriptive line of thought into a unified theory of wiggle room within the context of negotiation analysis.

In terms of prescriptions about whether one *should* ever wiggle, the literature is discordant. There is a tension between two of the founding teacher-practitioners of the interest-based negotiation tradition. In one camp, advising against wiggling, are Howard Raiffa and some of his former Harvard Business School students like Max Bazerman and James Sebenius.¹⁷ To understand what they had to say about wiggling, we need to backtrack to their account of how reservation values should be formed and used in the first place.

The first stage in determining your reservation value, Raiffa would say, is to start by creating a template for yourself.¹⁸ The template should list possible resolutions to each of the issues or facets of the deal or dispute being negotiated, and assign them subjective expected utility values. These ranges should be bounded by what look, from your perspective, like the best and worst possible scenarios for each issue.

With this template in hand, he says, you can begin the following process. Imagine the least desirable agreement that could result from the negotiation. You would probably prefer your BATNA rather than that outcome. Now suppose that hypothetical settlement were a little more favorable to you in regards to one or more of the constitutive issues. How does it compare to your BATNA? As you slightly “sweeten” this hypothetical settlement repeatedly, he says, keep weighing it against your BATNA, asking yourself if you would still rather revert to your BATNA.¹⁹ You are looking for the point at which you are indifferent between the package under consideration and the BATNA. When you get to that indifference point, stop. You have

¹⁶ DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* 83–102 (2001).

¹⁷ See MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 68 (1992); LAX & SEBENIUS, *3D NEGOTIATION*, *supra* note 3, at 86–90; DEEPAK MALHOTRA & MAX H. BAZERMAN, *NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE AND BEYOND* 20–21 (2008); RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION*, *supra* note 2, at 45; RAIFFA ET AL., *NEGOTIATION ANALYSIS*, *supra* note 5, at 101.

¹⁸ RAIFFA ET AL. *NEGOTIATION ANALYSIS*, *supra* note 5, at 213.

¹⁹ *Id.* at 222.

arrived at your reservation value. This template now allows you to evaluate, mid-negotiation, various packages, tradeoffs, and even your overall reservation value.²⁰ They admit that a party's reservation value might be a range instead of a point, which "may be all the accuracy we may need in practice."²¹ And, they add that this template conversion process can help you rank your "interests" before you negotiate.²² (Of course, they mean "interests" in the classic *Getting To Yes* sense—the ends you want, as opposed to a "position" you take about a means to getting them.)²³

Once in direct dialogue with the other parties, Raiffa says, you will want to keep your reservation value in mind as you consider potential settlements.²⁴ But you should also keep in mind your interests. He says, "Somehow everything should be referred back to how well each composite bundle fares in terms of the fundamental interests (objectives) of our decisionmaker and how important those interests are."²⁵ Raiffa claims that a formalization of that comparison is possible, although he resists doing so in print.²⁶ Raiffa goes on to say, "[My coauthors and I] like to think that template analysis need not inhibit creativity. Ideally there should be interplay between it and analysis. Make a template, but don't treat it as sacred. Be willing to play around with it."²⁷

I think some explicit and implicit ideas and assumptions informing this treatment of how negotiators set and use a reservation value are: (1) cognition precedes behavior—a negotiator's interests are static and discoverable (at least to herself), so barring any reprioritization of interests during template creation, self-discovery and self-analysis about interests will not follow the negotiation; (2) using a template, negotiators *can* quantify the subjective expected utility of their BATNA and potential deals to a workably accurate degree without inhibiting creativity or impairing their ability to adapt to new information; (3) negotiators should, in some circumstances, perform this quantification because doing so will help them; (4) "setting" a reservation value is a hypothetical and comparative process consisting of

²⁰ *Id.*

²¹ *Id.* at 222.

²² *Id.* at 214.

²³ ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40–41 (2d ed. 1991).

²⁴ RAIFFA ET AL., *NEGOTIATION ANALYSIS*, *supra* note 5, at 222.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 220.

weighing the subjective expected utility of a BATNA with increasingly embellished hypothetical deals until an indifference point is discovered; and (5) wiggling is a mistake.

A second camp is represented by two other venerable luminaries, Roger Fisher and William Ury. They too believe that assenting to a negotiated consensus should help execute your interests, not discover them. In service of this end, though, they do not recommend converting BATNAs into reservation values: “[The BATNA] is the standard against which any proposed agreement should be measured. That is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept.”²⁸

So for Fisher and Ury, just as for Raiffa et al., deals under discussion should be imagined on one side of the scale, and your interests should be the fulcrum. But here, Fisher and Ury say BATNAs, and not reservation values, are what you should place on the other side of this hypothetical scale. Why? It “is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept.”²⁹ They say that a reservation value, while conveniently instructive in one sense: (1) inhibits adaptive learning, leading you to “shut your ears, deciding in advance that nothing the other party says could cause you to raise or lower that bottom line”;³⁰ (2) inhibits creativity during the deal-crafting process;³¹ and (3) is likely to be set arbitrarily high, anchored on your ideal agreement³² (what Walton and McKersie called your “target”).³³ Fisher and Ury do say you might want to formulate a “trip wire,” a hypothetical point within the potential range of offers and demands where you would pause to reconsider the direction things are going. But they mean for this to be a reminder, not a restriction.

I think the explicit and implicit ideas and assumptions at work in this treatment of reservation values are: (1) cognition precedes behavior—a negotiator’s interests are static and discoverable (at least to herself), and self-discovery and self-analysis about interests will not follow the negotiation; (2) negotiators cannot reliably translate BATNAs into reservation values without

²⁸ FISHER ET AL., *supra* note 23, at 100.

²⁹ *Id.*

³⁰ *Id.* at 98.

³¹ *Id.* at 98–99.

³² *Id.* at 99.

³³ RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM 42 (2d ed. 1991).

running too great a risk of (a) anchoring on target values, (b) inhibiting creativity in the deal-making process, or (c) shutting their ears to game-changing information; (3) negotiators should not attempt such a translation from a BATNA to a reservation value; (4) setting a reservation value is a comparative and hypothetical exercise; and (5) wiggling, by definition, could happen only if you set a reservation value, which is a mistake.

To sum up, both camps believe negotiation should include a hypothetical comparison between potential agreements and interests. Fisher and Ury would stick to BATNAs, while Raiffa et al. think BATNAs can be fruitfully converted to reservation values. Even though Raiffa describes a process of reservation-value creation that anchors off of BATNAs, Fisher and Ury fear that negotiators will anchor off of target values instead. Fisher and Ury fear that reservation values will prevent negotiators from recalibrating, but Raiffa et al. fear a BATNA will lead to imprecision.

III. REVIEW OF RELEVANT ANALYTICAL CONCEPTS AND TERMS

Some well-worn definitions at the heart of quantitative negotiation analysis, including many I have already mentioned, operate as if no one wiggles. As I organize, critique, and supplement them, I will refer to an example of a two-party distributive negotiation over one quantifiable issue—the sale of one widget from a seller, *s*, to a buyer, *b*.

The least the seller is willing to accept is known to many as the seller's "reservation value" (RV), which by convention I will denote as *s*.³⁴ Similarly, the buyer's reservation value, *b*, is commonly defined as the most he is willing to give in the negotiation.³⁵ Some who once used the term "reservation price" instead have since moved away from this term, presumably because it fails to capture nonmonetary issues as well.³⁶ "Bottom line" has also been used,³⁷ even though that phrase can be confused with its other meanings. And, like "walk-away point"³⁸ and "resistance point,"³⁹ two other terms commonly considered synonymous with

³⁴ RAIFFA ET AL., *NEGOTIATION ANALYSIS*, *supra* note 5, at 110–11.

³⁵ *Id.*

³⁶ Compare BAZERMAN & NEALE, *supra* note 17, at 68, with MALHOTRA & BAZERMAN, *supra* note 17, at 20–21.

³⁷ FISHER ET AL., *supra* note 23, 98–100.

³⁸ MALHOTRA & BAZERMAN, *supra* note 17, at 37.

³⁹ WALTON & MCKERSIE, *supra* note 33, at 41.

reservation value, “bottom line” conjures a descriptively inaccurate image of a reservation value.

None of these customary terms and definitions for the least (or most) a negotiator is willing to take (or give) accurately describe reality. A reservation value is not necessarily, as custom would have it, the threshold for what a negotiator is willing to accept per se, just what he or she *intends* that threshold to be.⁴⁰ The negotiator might wiggle. In this way, *custom falsely renders a rationalistic prescription for negotiating behavior as a description of that behavior*.⁴¹ Reservation values are better expressed as perceptions of one’s threshold, not as the threshold itself.

Equipped with this proposed amendment to the definiendum of reservation value and its ilk, we can organize and add to the taxonomy of reservation values, edging still closer to a precise definition of wiggle room.

To begin with, we might have a reservation value for a single issue or for a whole package of issues up for discussion.⁴² Let us call a reservation value that a party conscientiously decides for itself a “self-determined reservation value.” A party’s best guess as to what another party’s self-determined reservation value is could be called something like an “other-determined reservation value.”

Consider the level of intended publicity. Reservation values can be “unannounced” or “announced” to other parties, a neutral third party, the public, or the world.⁴³ Announced reservation values come in two flavors: “feigned”⁴⁴ and what we might call “sincere.” A sincere RV is equal to the party’s self-determined RV, and feigned ones are not.

Raiffa et al. used the term “true reservation value” to refer to what I have called self-determined RVs, in order to distinguish them from announced RVs.⁴⁵ This use of the “true” modifier implies that people have perfect self-insight, which ignores the possibility of wiggle room. I will use “true

⁴⁰ Donald Davidson explained in philosophical terms why intentions are conditioned on unstated beliefs about the future. DAVIDSON, *supra* note 16, at 100.

⁴¹ E-mail from Blake Emerson, Ph.D. Candidate at Yale University, to Noah Susskind, author (Jan. 11, 2010, 21:40 EST) (on file with author) (phrasing the issue in these words).

⁴² MALHOTRA & BAZERMAN, *supra* note 17, at 73. Admittedly, an issue reservation value can effectively stand as a package reservation value if one issue matters so much to us that we will not accept any resolution that does not satisfy our reservation value on that one issue.

⁴³ RAIFFA ET AL., NEGOTIATION ANALYSIS, *supra* note 5, at 122–23.

⁴⁴ LAX & SEBENIUS, MANAGER AS NEGOTIATOR, *supra* note 3, at 121–22.

⁴⁵ RAIFFA ET AL., NEGOTIATION ANALYSIS, *supra* note 5, at 122–26.

reservation value" in a more accurate sense below.

Whether resulting from research, negotiation, fiat, lottery, or whim, all self-determined, other-determined, and announced reservation values for either packages or single issues fall under the genera of what we might call "decided reservation values." In temporal and sometimes epistemological contrast, there also exists a genera of what I would christen "revealed reservation values."⁴⁶ They are not just what a party decides or announces its threshold will be, but what that threshold actually turns out to be: "Rory offered as much as X and Dominique accepted" (or "Dominique eventually expressed willingness to accept as little as Y but Rory refused"). Though not independent of psychology, revealed reservation values are by definition empirically measurable after the fact. Decided RVs are *ex ante*; revealed RVs are *ex post*.

Now, the farthest a party could be pushed, come what may (which the field currently calls a "reservation value," and which I would re-label a "true reservation value") is not measurable. Does it even exist? Infinitely many significant things could happen. What is the least you would take on the courthouse steps if there were an earthquake? If you won the lottery? If all the evidence burned?

Revealed reservation values are not necessarily equal to true reservation values. But while revealed reservation values are sometimes identical to self-determined reservation values, sometimes they are different. In those instances, wiggle room exists.⁴⁷ That is the precise definition of wiggle room.

Let another neologism, "wiggler," refer to the party or person who knowingly (but not necessarily deliberately) slides past a self-determined issue or package reservation value to reach agreement. Let "wrangler" be a party or person who actively induces wiggling. Notice that because of how these two terms are defined, there can be a wiggler without a wrangler, but not a wrangler without a wiggler. And people can be both wigglers and wranglers at the same time. When all parties wiggle, I would want to label that a "compromise," an everyday pejorative term the field has struggled to dissociate from the joint gains of integrative bargaining.⁴⁸

⁴⁶ I do not mean to conflate this with the existing economic term "revealed preference," though I thank Blake Emerson for suggesting it I consider that concept in order to help refine this one. E-mail from Blake Emerson, *supra* note 41.

⁴⁷ Observe that wiggle room is not "salami slicing"—asking for a little more when consecrating an agreement that all parties have already assented to.

⁴⁸ *E.g.*, THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 466, 488, 807 (Lawrence Susskind et al. eds., 1999).

A “last best offer” (LBO) is a party’s final bid at mutual agreement. What one party labels its LBO might not be its LBO. Also, despite being labeled an LBO, a final bid may not be believed by the other party to really be an LBO.

Rounding out our review of basic negotiation argot, a “target”⁴⁹ or “aspiration value”⁵⁰ is, as suggested above, the value of an agreement a party aspires to secure in a negotiation.

We also need a term to label the offers or demands that fail to meet a self-determined RV but are temptingly close nonetheless. Thomas Schelling, as well as Fisher, Ury, and Patton, have referenced the Sirens of Homer’s *The Odyssey* in discussions related to the present topic.⁵¹ Therefore, I will label these tempting possibilities “siren songs,” while jettisoning that label’s pejorative overtones. Some but not all siren songs are LBOs, and not all LBOs are siren songs.

A party’s BATNA is its best relevant course of action if the negotiation at hand ends in impasse.⁵² Even scholarship aimed at clarifying the meaning of BATNA has confused its definition.⁵³ According to the term’s originators, the BATNA would be not just an “alternative” but the whole process of pursuing that alternative, along with all the concomitant benefits and costs.⁵⁴ These costs include not just transaction costs (like search and information costs, bargaining costs, opportunity costs, and policing and enforcement costs), but also the changeover cost of switching to the BATNA. The changeover and transaction costs of a BATNA can be financial, temporal, and even psychological. And the fact that BATNAs can incorporate uncertainties⁵⁵ underscores that a BATNA is not just an alternative deal but the process of pursuing that deal.

⁴⁹ WALTON & MCKERSIE, *supra* note 33, at 42.

⁵⁰ RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION*, *supra* note 2, at 44.

⁵¹ Thomas C. Schelling, *The Intimate Contest for Self-Command*, 60 *THE PUBLIC INTEREST* 94, 94–103 (1980); FISHER ET AL., *supra* note 23, at 98; *THE ODYSSEY OF HOMER* Book XII, Lines 39–54, 186 (Richmond Lattimore trans., Harper & Row 1965).

⁵² FISHER ET AL., *supra* note 23 coined this term; *see also* John Nash, *Non-Cooperative Games*, 54 *ANNALS MATHEMATICS* 286, 295 (1951) (explaining cooperative behavior in terms of players’ non-cooperative options).

⁵³ *E.g.*, White & Neale, *supra* note 13, at 379–80.

⁵⁴ WILLIAM URY, *GETTING PAST NO: NEGOTIATING IN DIFFICULT SITUATIONS* 21–22 (rev. ed. 1993).

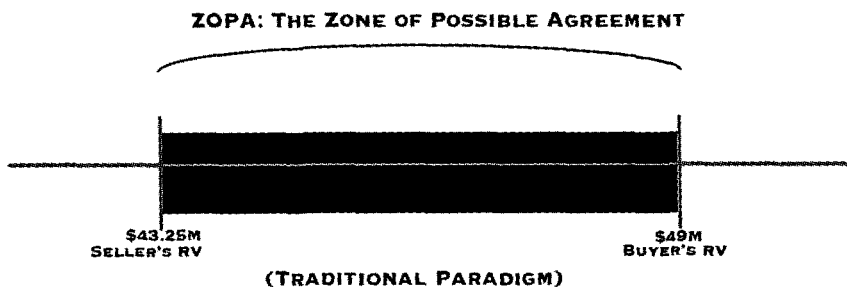
⁵⁵ *E.g.*, LAX & SEBENIUS, *MANAGER AS NEGOTIATOR*, *supra* note 3, at 57; RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION*, *supra* note 2, at 70–77; RAIFFA ET AL., *NEGOTIATION ANALYSIS*, *supra* note 5, at 129–48.

If $b < s$, there will be no deal, because the most the buyer is willing to pay is not enough to satisfy the seller. In this case, there is what some have called “no possible agreement” (NOPA).⁵⁶ If $s \leq b$, then that is a “zone of possible agreement” (ZOPA), commonly defined as the range of possible values the negotiators could potentially agree upon. The existence of a ZOPA does not guarantee agreement, but if the parties do reach agreement, then—according to the conventional definition—it can only be within the ZOPA.⁵⁷ NOPA and ZOPA are perhaps best understood graphically, so I will critique their conventional definitions as I build a graphical model of wiggle room.

IV. NOPA AND ZOPA CRITIQUED & WIGGLE ROOM PRESENTED GRAPHICALLY

It would be impossible and useless to create a model that tries to suggest all the infinite places at which a revealed or true RV could arrive. But in some cases it might be possible and useful to model wiggle room by depicting the probable discrepancy between revealed reservation values and self-determined reservation values.

To see how, let us graph wiggle room one-dimensionally. Wiggle room can exist in either of two possible scenarios: when there is a ZOPA and when there is NOPA. We will start with the former. Here is an example of how a ZOPA is *usually* graphed and conceived:



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These are crisp, traditionally defined reservation values; they mean to represent the most the parties are willing to give or take. “The ZOPA is the

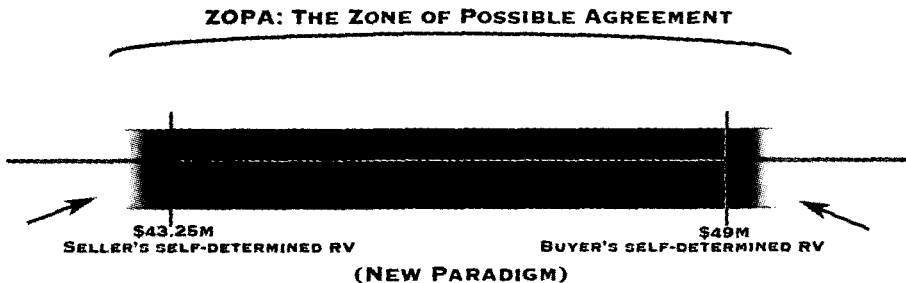
⁵⁶ Wheeler, *supra* note 14, at 245.

⁵⁷ E.g., ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 21 (2004).

⁵⁸ See, e.g., MALHOTRA & BAZERMAN, *supra* note 17, at 23.

WIGGLE ROOM

set of all possible deals that would be acceptable to both parties.”⁵⁹ Accordingly, conventional wisdom holds that deals outside this ZOPA are not possible.⁶⁰ Even Walton and McKersie, who correctly recognized the perceptual origins of “resistance points,” make that same claim.⁶¹ But this canonical model of the ZOPA, while internally consistent, is descriptively inaccurate. It assumes that the self-determined reservation values are also true reservation values. The existence of wiggle room means that sometimes agreements are possible outside the “zone of possible agreements”! This contradiction should be corrected. One solution is to say that the boundaries of the ZOPA are revealed reservation values. But that would be unhelpful because revealed reservation values do not emerge until the negotiation is over. A second option would be to admit that the ZOPA is actually bounded by true reservation values, but since we do not know where they are exactly, we can use gray areas to show where revealed RVs might fall—relative to self-determined RVs—as a result of wiggling. The arrows below draw attention to gray areas I have added to show wiggle room, where revealed reservation values might lurk.



In the second possible scenario, there is not a traditionally-defined ZOPA. Instead, there is NOPA. Each party's wiggle room could only lie between that party's self-determined reservation value and the other party's self-determined reservation value. For example, if $s = \$20$ and $b = \$10$, then

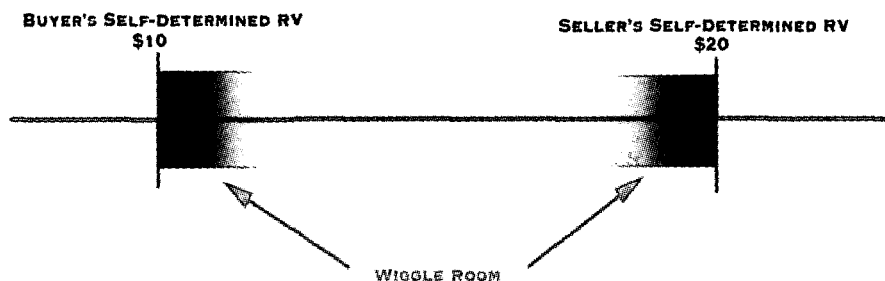
⁵⁹ *Id.*; see also, MNOOKIN ET AL., *supra* note 57, at 18–22, 107.

⁶⁰ E.g., LAX & SEBENIUS MANAGER AS NEGOTIATOR, *supra* note 3, at 51; MNOOKIN ET AL., *supra* note 57, at 18–22, 107; RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, *supra* note 2, at 45; RAIFFA ET AL., NEGOTIATION ANALYSIS, *supra* note 5, at 110; WALTON & MCKERSIE, *supra* note 33, at 43.

⁶¹ WALTON & MCKERSIE, *supra* note 33, at 42–43. What they called a “settlement range,” Fisher and Ury renamed the “zone of potential agreement.” FISHER ET AL., *supra* note 23, at 134.

there is wiggle room as long as there is a chance that either b 's revealed $RV > \$10$ or s 's revealed $RV < \$20$.

SCENARIO 2: NOPA



Paradoxically, if the wiggle room for each of these parties were to overlap, they might reach agreement even if there were “no possible agreements.” Perhaps, then, we need to redefine NOPA too. Strictly speaking, there are no possible agreements only when *true* RVs, not self-determined RVs, leave no room for possible agreements. But it is impossible to predefine what the true RVs are. So, we could leave self-determined RVs as the boundaries of a NOPA, as long as we remember that NOPA does not quite mean what it purports to mean.

By now it should be clear why I would discourage the custom of visualizing self-determined RVs as merely “lines” or “points.” They can include an abutting gray area.

For greater graphical precision, we need to transition to two-dimensional space. What would the x-axis and y-axis represent? Wiggle room is partly a function of personality: a party’s stubbornness, obstinacy, doggedness, or firmness—or, alternately—amenability, tolerance, or softness. The least pejorative term might be “flexibility.” Psychometricians measure personal attributes like this with questionnaires, the facial electromyograph, the electroencephalograph, and functional magnetic resonance imaging⁶²—none of which we can expect to employ on our counterparts during negotiations. Therefore we need a measurement one step removed that we can use to measure uncertainty about wiggling. We can describe and quantify uncertainty with probability measures, possibility measures, plausibility

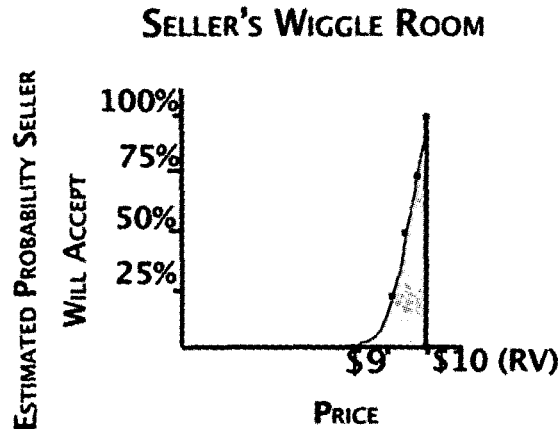
⁶² SHARON S. BREHM, SAUL KASSIN & STEVEN FEIN, *SOCIAL PSYCHOLOGY* 188–89 (6th ed. 2005).

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measures, Dempster-Shafer belief functions, or ranking functions.⁶³ I will use probability measures, and I will discuss arguments for and against this choice after illustrating it.

Let us start by constructing a graph showing the wiggle room for one person who might wiggle in one direction. We can put the possible values of the agreement (in any kind of units) on the x-axis, with the self-determined reservation value at one end. On the y-axis we can put the estimated likelihood that the person would be willing to accept agreements at the x-axis values. (Or we could instead estimate probabilities *relative* to the y-value at the RV.) Whose estimates are used is up to the graph's creator.

Let us graph the wiggle room for s . Suppose \$10 is the self-determined RV, and we estimate that the probability s will accept a deal at that value is 100%. Suppose our other data points are (\$9.75, 75%), (\$9.50, 50%), and (\$9.13, 25%). We get:



The gray area is the wiggle room. The first few decrements or increments away from an RV along the x-axis occupy the majority of the values in play (where there is wiggle room at all). I suspect that most wiggle room curves drop precipitously and reach a probability of zero for many x-values. Along a third axis, one might also show the passage of time, since flexibility can change.

In some negotiations, it might be useful to sketch wiggle room curves like this for each party. Discussing the curve that describes our own party's wiggle room would help its members align. To do so, we could start, if we are positioned like a seller, by asking ourselves *which* x-value that is less

⁶³ See generally JOSEPH Y. HALPERN, REASONING ABOUT UNCERTAINTY (2005).

attractive than our self-determined RV we are only 50% as likely to accept as no agreement (or 50% as likely to accept as our self-determined RV, if we are calculating y-values relatively). In doing so, we should presume that we believed the hypothetical x-value in question was the last best offer. We could go on to ask ourselves the same question regarding y-values of 25% and 75%. I chose these percentages arbitrarily. One could also begin with given x-values and ask about y-values: how likely is it that we would accept an offer at x_1 ? While probably not a popular exercise, this could be helpful. And if we saved our 3-D graphs for every negotiation, we could see what the average curve looked like in different contexts, use this (or a probability density function built from it) to help us estimate other parties' flexibility curves, and capitalize. I would conduct laboratory experiments with this goal if I had the resources.

This representational scheme is useful because the slope of the curve is determined in part by the flexibility of the party—the attribute we are trying to model. The steeper the slope, the more inflexible the party. Unfortunately, the slope's descriptive power is diluted by other factors, like the accuracy of the estimations. Indeed, the curve's shape illustrates the shortfalls of at least one of probability's four assumptions about rationality: (1) if one agreement option is better than another by even the smallest margin, it is preferred, (2) preferences are transitive, (3) one can always compare complementary options, and (4) preferences are determined point-wise.⁶⁴ The first assumption is challenged by the fact that the curve will probably look like steps in some places, because certain values or ranges can become arbitrarily significant or insignificant.⁶⁵ As a mediator, I have encountered plaintiffs who find the subjective difference between, say, \$10 million and \$10.1 million to be much less significant than the subjective difference between \$9.9 million and \$10 million. Concessions perceived to be disproportionately stingy can even be decreasingly attractive precisely because they surrender “the smallest margin” of value.

V. WHY WE WIGGLE, OR, HOW TO WRANGLE

From the perspective of a wiggler and a wrangler, I will list and interpret a menu of wiggle room's causes. Then, I will draw attention to the evidence most at odds with Fisher et al. and Raiffa et al.'s understandings of reservation values.

⁶⁴ *Id.* at 20–22.

⁶⁵ WALTON & MCKERSIE, *supra* note 33, at 25–30.

At the outset, three clarifications are in order. My purpose is to explain wiggling and wrangling, not justify or condemn them. Second, I think the more complex a negotiation becomes, the harder (and maybe less worthwhile) it is to formulate a crisp self-determined RV, and so the less likely it is that a party can be said to be wiggling. Third, I will continue to assume an “ancient and commonsense” proposition defended by Donald Davidson: that the reasons a decisionmaker has in mind when acting, for acting, can be said to be a kind of “cause” for that action, even if not the only one.⁶⁶ But as we will see in a subsequent section about *how* people wiggle, the reasons one has in mind when wiggling might not be why one wiggled.

Now for a list of wiggling’s possible causes:

(1) Wiggle room depends on the wiggler’s perception that further improvement to the agreement on the table is impossible⁶⁷ or will net little more than a pyrrhic victory. This perception is shaped by the wrangler’s ability to persuade the wiggler that the wrangler’s announced reservation value is sincere, and that it will be equal to her revealed RV as well.⁶⁸ Convincing theatrics aside, one way to do this is to make a “commitment . . . binding, credible, visible, and irreversible” to a specific reservation value.⁶⁹ Suppose a real estate buyer is trying to prove that his RV is \$16,000, which happens to be \$1,000 less than the skeptical seller’s announced self-determined RV. And “suppose the buyer could make an irrevocable and enforceable bet with some third party, duly recorded and certified, according to which he would pay for the house no more than \$16,000, or forfeit \$5,000.”⁷⁰ Crossing the Rubicon with a commitment like this might convince the seller to wiggle.

However, alleging that one’s self-determined, announced, revealed, and perhaps even true RVs are identical from the start is not necessarily conducive to wrangling. Wrangling might be more likely if a would-be

⁶⁶ DAVIDSON, *supra* note 16, at 3–20.

⁶⁷ RAIFFA ET AL., *NEGOTIATION ANALYSIS*, *supra* note 5, at 274 (“I saw that I had to get 35 points, but it wasn’t possible—the instructions were wrong.”).

⁶⁸ Such persuasion routinely involves deceit, raising ethical questions. WHAT’S FAIR: ETHICS FOR NEGOTIATORS 65–102 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004).

⁶⁹ LAX & SEBENIUS, *MANAGER AS NEGOTIATOR*, *supra* note 3, at 125. *C.f.* Daniel Druckman, *Visibility and Negotiating Flexibility*, 136 J. SOC. PSYCHOL. 118 (1996) (suggesting that the visibility of a negotiation, viz. its location and media coverage, can affect negotiators’ flexibility, with more visibility leading to less flexibility).

⁷⁰ THOMAS C. SCHELLING, *An Essay on Bargaining*, in *THE STRATEGY OF CONFLICT* 21, 24 (2d ed. 1980).

wiggler thinks the would-be wrangler is wiggling too, since perceptions of fairness can dominate even purely economic exchanges.⁷¹ In ultimatum bargaining games, for example, many would rather reach impasse than agree to a deal they perceive to be better for another party than for themselves.⁷²

(2) Wiggling depends on the attractiveness of BATNAs. Common sense suggests that a negotiator with a less attractive BATNA is more likely to wiggle. Its attractiveness depends on things like the agreement(s) presently on the table, certainty of the BATNA's attainability, personal preferences about whom to deal with, changeover costs, and perceptions of the other party's contentment with their BATNA. Even the amount of foreseeable time between the choice at hand and the BATNA in reserve affects its attractiveness, which generally declines hyperbolically.⁷³ (Indeed, parts of the brain responsible for the sensation of pleasurable excitement light up when we imagine a monetary reward in the near future but not the distant future.⁷⁴)

(3) If someone does not offer us a siren song, we will not wiggle. But parties do not try to start with siren songs. If they are smart, they start with moves that take place away-from-the-table and change the playing field in their favor.⁷⁵ That includes improving their BATNA and self-determined RV, shaping other parties' BATNAs and self-determined RVs, and so on. Parties can continue these moves throughout, but what else happens when we sit down to the table, in terms of offers and demands along the way to siren songs?

- a. We start with opening gambits. If the other party views yours as a siren song, they will likely claim more value than they could have otherwise, and in a zero-sum game, this might mean you have made a mistake. But opening offers or demands that are too far from the other party's self-determined or announced RV can cause a "chilling effect,"⁷⁶ leading others to become disinterested, insulted, or even suspicious that you are bargaining

⁷¹ BAZERMAN & NEALE, *supra* note 17, at 116–25.

⁷² Werner Güth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367, 382–85 (1982).

⁷³ George Ainslie, *Specious Reward: A Behavioral Theory of Impulsiveness and Impulse Control*, 82 PSYCHOL. BULL. 463 (1975).

⁷⁴ Samuel M. McClure et al., *Separate Neural Systems Value Immediate and Delayed Monetary Rewards*, 306 SCI. 503–07 (2004).

⁷⁵ LAX & SEBENIUS, 3D NEGOTIATION, *supra* note 3, at 91–97.

⁷⁶ THOMPSON, THE TRUTH ABOUT NEGOTIATIONS, *supra* note 12, at 12.

in bad faith. A chilling effect can also cause a “boomerang effect,” where a farfetched opening gambit elicits an equally farfetched counteroffer.⁷⁷ The trick, naturally, is to make an opening gambit that is plenty far from the other party’s self-determined RV, but not too far. If you have good information on their likely BATNA, you might be able to ballpark their self-determined RV and make an opening gambit not counterproductively far from it. If you do not have such information, it might behoove you to let them make the first offer, as long as you can quickly counter any farfetched opening gambit of theirs in order to prevent them from mentally anchoring on it.⁷⁸

- b. Depending on the context, moving from a good opening gambit to a siren song should probably take several exchanges. If you make mostly large concessions (and your opening gambit was too generous), you are more likely to skip past the wiggle room by making an offer that is more attractive to the other party than their self-determined RV. (Remember how the curve drops precipitously in the two-dimensional wiggle-room graph.) That is why the oft-mentioned two-stage persuasion strategies—making a large request and then a small one, or vice versa⁷⁹—might be too drastic to find the wiggle room.⁸⁰ A more nuanced strategy would be incremental: make larger initial concessions to signal reasonableness and elicit reciprocity, and follow with increasingly small concessions to signal, as mentioned in (2), the approach of an RV.⁸¹

(4) Logrolling or “linking”⁸² issues might tempt negotiators to wiggle on one issue in order to get what they want on another, perhaps especially when talks are mediated by a neutral who, some have argued, can help parties

⁷⁷ *Id.*

⁷⁸ MALHOTRA & BAZERMAN, *supra* note 17, at 31; RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, *supra* note 2, at 40.

⁷⁹ ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 37–40 (5th ed. 2009).

⁸⁰ Besides, these sequential request tactics are only powerful to the extent that they are not recognized for what they are. Joseph Schwarzwald et al., *The Applicability of the Door-in-the-Face Technique when Established Behavioral Customs Exist*, 9 J. APPLIED SOC. PSYCHOL. 577, 585 (1979).

⁸¹ RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, *supra* note 2, at 48.

⁸² *Id.* at 13, 33.

interpret each other's communications.⁸³

(5) Decision analysis helps us articulate and quantify the aforementioned difference between the subjective expected utility of BATNAs and that of self-determined RVs.⁸⁴ But this is difficult.⁸⁵ One reason is that the difference between BATNAs and self-determined RVs is the sum of not just easily quantifiable benefits and costs, but also psychological and subjective experiences like the changeover cost of "inconvenience." These can be hard to quantify for at least three reasons: (a) they are nebulous by nature; (b) they can change; and, (c) finally, people are not as good as they think they are at "affective forecasting"—predicting how they will feel.⁸⁶

Midwestern college students predict they would be happier about the weather and more satisfied with life as a whole if they lived in California, but surveys of California college students confirm only the former.⁸⁷ Indeed, if surveys of people who have actually experienced certain things can validly be compared to people's estimations of how they would feel if those things happened to them, we consistently overestimate how various personal and environmental changes—like air pollution, rainforest depletion, decreased risk of nuclear war, increased risk of AIDS, changes in income and chronic health conditions, receiving or being denied tenure, or winning the lottery—would affect our happiness in the long term.⁸⁸ People overestimate how bad they would feel, and how long they will feel it, "if they lose a job or a romantic partner, if their candidate loses an important election or their team loses an important game, if they flub an interview, flunk an exam, or fail a

⁸³ E.g., LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 19 (1987).

⁸⁴ See generally RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION*, *supra* note 2; RAIFFA ET AL., *NEGOTIATION ANALYSIS*, *supra* note 5.

⁸⁵ RAIFFA ET AL., *NEGOTIATION ANALYSIS*, *supra* note 5, at 222.

⁸⁶ George Loewenstein & David Schkade, *Wouldn't It Be Nice? Predicting Future Feelings*, in *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY* 85, 85–86 (Daniel Kahneman et al. eds., 1999). See generally DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2007).

⁸⁷ David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 *PSYCHOL. SCI.* 340, 343 (1998).

⁸⁸ George Loewenstein & Shane Frederick, *Predicting Reactions to Environmental Change*, in *ENVIRONMENT, ETHICS, AND BEHAVIOR* 52, 66–67 (Max H. Bazerman et al. eds., 1997).

contest.”⁸⁹ One study even found that reported happiness levels were eventually the same for those who got what they wanted as for those who did not.⁹⁰ This phenomenon may be due in part to focalism, “whereby people focus too much on the event in question and not enough on the consequences of other future events.”⁹¹ Another possible cause is presentism, which is “the tendency for current experience to influence one’s views of the past and future.”⁹² There is also adaptation, which is the tendency to get less and less pleasure from the good (also known as habituation or diminishing/declining marginal utility) or displeasure from the bad.⁹³ However, people’s affective forecasts are more accurate if they are prompted to imagine experiencing not just the event in question but its surrounding everyday activities.⁹⁴ Indeed, people from cultures that emphasize holistic thinking tend to make better affective forecasts.⁹⁵

What does this mean for negotiation and wiggle room? Most importantly, negotiators do not have a perfect grasp of how hypothetical outcomes would make them feel, so the subjective expected utility of assorted BATNAs and RVs will probably include human error that wranglers can exploit. And, one way we can push for precision in our own affective forecasts is to force ourselves to think holistically, rather than myopically, when we imagine hypotheticals throughout the negotiation process.

(6) Self-determined reservation values can be conceived as a personal standard, and research shows that focusing our attention on ourselves enables

⁸⁹ GILBERT, *supra* note 86, at 167. See generally Daniel T. Gilbert et al., *The Trouble With Vronsky: Impact Bias in the Forecasting of Future Affective States*, in *THE WISDOM IN FEELING: PSYCHOLOGICAL PROCESSES IN EMOTIONAL INTELLIGENCE* 114, 114–43 (Lisa Feldman Barrett & Peter Salovey eds., 2002); Timothy Wilson & Daniel T. Gilbert, *Affective Forecasting*, in 35 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 345 (Mark Zanna ed., 2003).

⁹⁰ Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 *J. PERS. & SOC. PSYCHOL.* 617, 618–24 (1998); BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS: HOW THE CULTURE OF ABUNDANCE ROBS US OF SATISFACTION* 175 (2005).

⁹¹ Timothy D. Wilson et al., *Focalism: A Source of Durability Bias in Affective Forecasting*, 78 *J. PERS. & SOC. PSYCHOL.* 821 (2000).

⁹² GILBERT, *supra* note 86, at 121–39.

⁹³ *Id.* at 144, 239; Schwartz, *supra* note 90, at 167–79.

⁹⁴ See generally Wilson et al., *supra* note 89.

⁹⁵ See generally Kent C. H. Lam et al., *Cultural Differences in Affective Forecasting: The Role of Focalism*, 31 *PERSONALITY & SOC. PSYCHOL. BULL.* 1296 (2005).

self-evaluation according to standards we perceive about what we ought to be or do. This can be a self-control mechanism that affects our behavior.⁹⁶ Inversely, “many experiments have shown that when people are not self-focused, their actions are often unrelated to their personal standards—self-awareness is needed for people to reduce disparities between their actions and their ideals.”⁹⁷ In one study, a restaurant asked people to pay for their drinks using just the honor system, and customers left almost three times more money in total when a picture of two eyes, rather than a picture of flowers, was behind the deposit box.⁹⁸ So, a negotiator practicing mindful self-awareness might be more focused on his or her self-determined reservation value and thus less likely to wiggle.

(7) Sunk costs can bias decisionmaking⁹⁹ and encourage wiggling.¹⁰⁰ However, education about this bias dampens its effect.¹⁰¹ I hypothesize that parties are more likely to wiggle when reminded and concerned about the sunk costs of negotiation but unaware of the potential for their own sunk cost bias.

(8) Relationships matter to wiggle room.

- a. A longstanding and friendly relationship with other parties might cause some flexibility. We do favors for our friends, family, and colleagues. We might also be more likely to trust them when they say that their announced RV is identical to their self-determined RV. And, previous negotiations might have taught us about their (and our) abilities to predict their revealed RVs.
- b. Being strangers can cut both ways. If strangers know, suspect, or hope there is a chance they will negotiate with each other again,

⁹⁶ See generally SHELLY DUVAL & ROBERT A. WICKLUND, *A THEORY OF OBJECTIVE SELF-AWARENESS* (Academic Press 1972). See also Frederick X. Gibbons, *Self-Attention and Behavior: A Review and Theoretical Update*, in 23 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 249–303 (Mark P. Zanna ed., 1990).

⁹⁷ Paul J. Silvia, *Self-Awareness Theory*, *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (Macmillan 2008), available at <http://www.encyclopedia.com/doc/1G2-3045302373.html>.

⁹⁸ Melissa Bateson et al., *Cues of Being Watched Enhance Cooperation In A Real-World Setting*, 2 *BIOLOGY LETTERS* 412–14 (2006).

⁹⁹ See generally ALLAN I. TEGER, *TOO MUCH INVESTED TO QUIT* (1980).

¹⁰⁰ RAIFFA ET AL., *NEGOTIATION ANALYSIS*, *supra* note 5, at 274 (“We worked so hard in trying to find a solution. . .”).

¹⁰¹ Richard P. Larrick et al., *Teaching the Use of Cost-Benefit Reasoning in Everyday Life*, 1 *PSYCHOL. SCI.* 362 (1990).

they might wiggle to protect credibility,¹⁰² or stand firm to avoid setting an undesirable precedent. If strangers do not anticipate future interactions, they might wiggle because they do not fear setting a bad precedent, or stand firm because they do not feel there is a personal relationship to protect.

- c. Disliking the other party can cut either way too. We might be less inclined to give in to someone unsavory, or instead we might wiggle to end the interaction faster.

(9) It was discussed earlier that commitments—announced and reinforced reservation values, essentially—can help to convince others to wiggle because we will not. Why? Especially in the context of principal-agent tensions, negotiators might fear that wiggling risks damaging relationships and reputations among those on the same side of the bargaining table. So helping the would-be wiggler save face would make wrangling easier. This is because egos matter in negotiations.¹⁰³ They affect the emergence of wiggle room in at least two ways. A wiggler's self-esteem might not permit wiggling if it would be embarrassing. On the other hand, the same negotiator might fear reporting a "failure" to reach agreement. Sometimes not coming to an agreement is in a party's best interest,¹⁰⁴ but unfortunately it is still not uncommon to view stalemate as a kind of failure. Ego can thus both encourage and deter wiggling and wrangling.

(10) Parties are probably more likely to wiggle when a negotiation's length leads to fatigue, stress, fear, excitement, or boredom. Length is also associated with the momentum of a negotiation—the inertia and rhythm of a continuous give-and-take that can lead parties to agreements they would not accept if the negotiation were more syncopated. So, nonstop negotiation might increase your chances of wrangling others.

(11) Daniel Shapiro points out that identity matters to negotiations.¹⁰⁵ This, too, has consequences for the emergence of wiggle room. Wigglers might not want to be seen (or see themselves) either as pushovers or too stubborn to accept a worthwhile but subpar agreement. Convincing those on the other side that you see them as reasonable and pragmatic, rather than pushovers, might help you to wrangle them.

¹⁰² RAIFFA ET AL., *NEGOTIATION ANALYSIS*, *supra* note 5, at 119.

¹⁰³ ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 95–114 (2006).

¹⁰⁴ LAX & SEBENTUS, *MANAGER AS NEGOTIATOR*, *supra* note 3, at 55.

¹⁰⁵ Daniel L. SHAPIRO, *Identity: More than Meets the "I,"* in *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 225, 225–30 (Andrea Kupfer Schneider et al. eds., 2006).

(12) In 1979, Kahneman and Tversky demonstrated some now-famous biases pertaining to risk aversion. When they offered subjects a hypothetical choice between a guaranteed gain of \$3,000 or an 80% chance of \$4,000, most subjects chose the smaller but certain gain. When the experimenters offered subjects a hypothetical choice between a guaranteed loss of \$3,000 and an 80% chance of losing \$4,000, most chose the uncertain but potentially larger loss.¹⁰⁶

Why are we averse to uncertainty in negotiations? White and Neale suggested that its psychological cost owes to our need for structure.¹⁰⁷ They cite Kruglanski and Freund, who wrote:

The need for structure is the need to have some knowledge on a given topic, any knowledge as opposed to confusion and ambiguity. A need for structure once aroused is assumed to have an inhibiting or freezing influence on the hypothesis-generation process because the generation of alternative hypotheses endangers the existing hypothesis or structure.¹⁰⁸

If a recently floated deal is seen by a negotiator as a certain gain—even though it is less than the self-determined RV—it might be preferable to a less-certain BATNA that leads to more questions.¹⁰⁹ But a negotiator might also see a BATNA as more certain than an unenforceable agreement with an untrustworthy party. Uncertain gains cut both ways.

The same holds for aversion to loss. A defendant negotiating a civil settlement might prefer to risk a huge verdict in court than suffer a certain, but less fiscally damaging, settlement.¹¹⁰ On the other hand, a defendant who sees a negotiated loss as less certain than an inevitable but less-injurious BATNA may have some wiggle room after all.

Risk aversion can also stem from aversion to anticipated post-decision regret¹¹¹—we avoid risks that we fear we will later regret. Anticipated regret depends on post-decision regret's foreseeable causes, which include:

¹⁰⁶ Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decisions Under Risk*, 47 *ECONOMETRICA* 263 (1979).

¹⁰⁷ White & Neale, *supra* note 13, at 384.

¹⁰⁸ Arie W. Kruglanski & Tallie Freund, *The Freezing and Unfreezing of Lay-Inferences: Effects on Impressional Primacy, Ethnic Stereotyping, and Numerical Anchoring*, 19 *J. EXPERIMENTAL SOC. PSYCHOL.* 448, 450 (1983).

¹⁰⁹ BAZERMAN & NEALE, *supra* note 17, at 34–35.

¹¹⁰ MNOOKIN ET AL., *supra* note 57, at 161.

¹¹¹ Marcel Zeelenberg & Jane Beattie, *Consequences of Regret Aversion 2: Additional Evidence for Effects of Feedback on Decision Making*, 72 *ORG. BEHAV. &*

- a. Whether the decision was something we did. People say they would expect to regret acts of commission more than omission.¹¹² (When asked to reflect on their past, though, people report regretting acts of omission more.)¹¹³
- b. Whether we were responsible for the decision. We feel more regret for things we feel responsible for.¹¹⁴
- c. How nearly we lost out on something preferable. We regret missing the mark by a slim margin more than we regret missing by a wide one.¹¹⁵ This “nearness effect” goes hand in hand with (d).
- d. Whether we engage in “upward” or “downward” “counterfactual thinking”—thoughts about how things could have gone better or worse. Medvec et al. found that silver medalists report experiencing more regret than bronze medalists because silver medalists focus on the more salient (upward) counterfactual of nearly missing gold than the (downward) counterfactual of missing bronze.¹¹⁶ The bronze medalists, who reported feeling less regret, engaged more in downward counterfactual thinking, and thereby felt grateful that they medaled at all instead of coming in fourth.

HUM. DECISION PROCESSES 63, 77–78 (1997); Marcel Zeelenberg et al., *Consequences of Regret Aversion: Effects of Feedback on Risky Decision Making*, 65 ORG. BEHAV. & HUM. DECISION PROCESSES 148, 156–58 (1996); Ilana Ritov, *Probability of Regret: Anticipation and Uncertainty Resolution in Choice*, 66 ORG. BEHAV. AND HUM. DECISION PROCESSES 228, 235–36 (1996); Richard P. Larrick & Terry L. Boles, *Avoiding Regret in Decisions with Feedback: A Negotiation Example*, 63 ORG. BEHAV. & HUM. DECISION PROCESSES 87, 94–97 (1995).

¹¹² Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, 246 SCI. AM. 160, 170–73 (1982).

¹¹³ Thomas Gilovich & Victoria Husted Medvec, *The Experience of Regret: What, When, and Why*, 102 PSYCHOL. REV. 379, 381 (1995).

¹¹⁴ See Thomas Gilovich & Victoria Husted Medvec, *The Temporal Pattern to the Experience of Regret*, 67 J. PERS. & SOC. PSYCHOL. 357, 362–65 (1994); Marcel Zeelenberg et al., *Reconsidering the Relation Between Regret and Responsibility*, 74 ORG. BEHAV. & HUM. DECISION PROCESSES 254, 267–72 (1998).

¹¹⁵ Daniel Kahneman & Amos Tversky, *The Simulation Heuristic*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 201, 203 (Daniel Kahneman et al. eds., 1982).

¹¹⁶ Victoria Husted Medvec et al., *When Less Is More: Counterfactual Thinking and Satisfaction Among Olympic Medalists*, 69 J. PERS. & SOC. PSYCHOL. 603, 606 (1995).

So, people are more likely to wiggle if they fear the regret of wiggling less than they fear the regret of reaching impasse. Upward counterfactual thinking, a feeling of responsibility, the nearness effect, and acts of commission all lead to greater post-decision regret. A wrangler could try to capitalize on all of these by emphasizing to us, respectively, (1) why the siren song is better than our BATNA, (2) why this decision is ours to make, (3) how near the siren song is to our self-determined RV, and (4) the ways in which reaching impasse is an act of omission on our part.

(13) Anticipating or making hard trade-offs between two more or less equally attractive (or equally unattractive) alternatives tends to worsen mood rather than improve it.¹¹⁷ Given that we face this kind of choice when deciding between our BATNA and a siren song, does an attendant bad mood make us more or less likely to wiggle? Self-determined RVs can be seen as personal goals (“I will reject anything worse than X”), and the evidence about endeavoring to meet personal goals suggests that a bad mood makes us more likely to wiggle. Distress undermines smokers’ attempts to quit smoking, even when other factors like demographics and self-efficacy are controlled for.¹¹⁸ People prioritize mood-repair over other goals when they are in a bad mood, making them more liable to seek short-term pleasure in things like high-calorie foods.¹¹⁹ Therefore, weighing a self-determined RV against a siren song can worsen mood, and a worsened mood is more conducive to wiggling (if it’s seen as a source of pleasure).

Not only does a bad mood seem to lend itself to wiggling, but people also wiggle in order to avoid feeling bad. Reported expectations about negative affect (like shame or embarrassment) were responsible for causing

¹¹⁷ SCHWARTZ, *supra* note 90, at 125. See also Mary Frances Luce et al., *Emotional Decisions: Tradeoff Difficulty and Coping in Consumer Choice*, in 1 MONOGRAPHS J. CONSUMER RES. (Deborah Roedder John ed., 2001). at 126. “[D]ecision makers in this experiment were more likely to choose each of three different types of avoidant option in the more threatening high trade-off difficulty environment.” *Id.* at 126. “[S]ubjects asked to choose among five cars defined in terms of the high trade-off-difficulty attributes reported experiencing significantly more negative emotion than did subjects asked to choose among five cars defined in terms of the low trade-off-difficulty attributes”). *Id.* at 65.

¹¹⁸ Paul M. Cinciripini et al., *The Effects of Depressed Mood on Smoking Cessation: Mediation by Postcessation Self-Efficacy*, 71 J. CONSULTING & CLINICAL PSYCHOL. 292, 298–99 (2003).

¹¹⁹ Diane M. Tice et al., *Emotional Distress Regulation Takes Precedence Over Impulse Control: If You Feel Bad, Do It!*, 80 J. PERSONALITY & SOC. PSYCHOL. 53, 53–54 (2001).

clients to miss their first scheduled psychotherapy appointments despite strong intentions to keep them.¹²⁰

Admittedly, it might be argued that the food and drug-based studies about mood are not applicable to wiggle room in other contexts, because our bodies do not need to make deals in the same way they might need food or nicotine. So consider instead the mood-related psychological factor at work in what might be the most extreme instance of wiggling: confessing to first-degree murder when innocent. In the case of the rape and murder of the Central Park jogger, a particularly publicized example, five innocent teenagers confessed to the crimes—four while being videotaped.¹²¹ In fact, about 25% of all convicted prisoners exonerated by DNA evidence had previously given false confessions, incriminating statements, or guilty pleas.¹²² One would think that during a police interrogation, people's self-determined reservation value is something at least as self-preservationist as, "I will not confess to a crime I did not commit." Even when the stakes are as high as life imprisonment, people wiggle.

Kassin offers two explanations. One is that sometimes innocent suspects confess as an act of "compliance" in order to escape the fatigue, despair, and food and sleep-deprivation involved in police interrogations.¹²³ I have already mentioned the potential consequences of fatigue, so here I want to focus on despair. The police interrogation tactics recommended by Inbau et al. are now claimed to be "the most widely used approach[...]in the world."¹²⁴ These tactics would read like "Negotiation Hardball 101" if reworked and ported from interrogations to negotiations:

¹²⁰ Paschal Sheeran et al., *Increasing Attendance for Psychotherapy: Implementation Intentions and the Self-Regulation of Attendance-Related Negative Affect*, 75 J. CONSULTING & CLINICAL PSYCHOL. 853, 861 (2007).

¹²¹ Saul Kassin, *False Confessions and the Jogger Case*, N.Y. TIMES, Nov. 1, 2002, at A31; Susan Saulny, *Why Confess to What You Didn't Do?*, N.Y. TIMES, Dec. 8, 2002 § 4, at 5.

¹²² Innocence Project, *Understand the Causes: False Confessions*, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Aug. 30, 2010).

¹²³ Kassin, *supra* note 121, at A31.

¹²⁴ John E. Reid & Associates, Inc., *Company Information*, http://www.reid.com/r_about.html (last visited Sep. 8, 2010).

1. Confront the suspect with assertions of his or her guilt. 2. Develop 'themes' that appear to justify or excuse the crime. 3. Interrupt all statements of innocence and denial. 4. Overcome all the suspect's objections to the charges. 5. Keep the increasingly passive suspect from tuning out. 6. Show sympathy and understanding, and urge the suspect to tell all. 7. Offer the suspect a face-saving explanation for his or her guilty action. 8. Get the suspect to recount the details of the crime. 9. Convert the statement into a full written confession.¹²⁵

When brought to bear on negotiations, these hardball tactics, like interruption, might increase the chances of wrangling other parties by increasing their sense of despair. In mediation, however, they may unproductively escalate conflict. And Mnookin recounts how Anatoli Sharansky withstood their tortuous extremes at the hands of the KGB by demonizing his captors, viewing every interaction as a zero-sum game, moralizing, and remembering the potential ripple effects of wiggling.¹²⁶ In any case, the evidence on despair and false confessions suggests that the food and drug-related studies about mood's effect on wiggling may be applicable to negotiation.

(14) Kassin's second explanation for false confessions is that, because of social pressure, innocent suspects can "internalize" the belief that they are guilty,¹²⁷ especially if they lack a clear memory of the event in question or are presented with false inculpatory evidence.¹²⁸ This internalization relates to memories of crimes rather than memories of reservation values, but if the latter can be influenced like the former, perhaps negotiators are more likely to wiggle if they cannot refer (or be held accountable) to something that documents their self-determined RV. Also, if as a wrangler you can present evidence suggesting that the other party's self-determined RV is not what they thought it was, you increase your chances of wrangling them. Perhaps a would-be wiggler's best protections against these

¹²⁵ FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001), as summarized in BREHM ET AL., *supra* note 62, at 451.

¹²⁶ ROBERT MNOOKIN, BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT 36-49 (2010).

¹²⁷ RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY, AND SEXUAL HYSTERIA 155-56, 165-75 (1994).

¹²⁸ Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 126-28 (1996).

last two causes flow from the following research about self-control and personal goal implementation.

(15) Mark Muraven and Roy Baumeister have shown that self-control, as a psychological resource, is limited and can be depleted temporarily. Evidence suggests that (1) all of someone's self-regulation draws from a finite reservoir of resoluteness and self-control, and (2) self-regulation is like a muscle in that it temporarily tires.¹²⁹ Because of this tiring, a person's ability to self-regulate decreases as they exercise the "muscle" over an extended period.¹³⁰ And, if one activity depletes that reservoir of self-control, less will be available during a subsequent activity. From these two implications come two predictions. One is that parties' ability to resist a siren song will decrease over time. Leaving a siren song on the table would give it what Schelling would call a continuous "time profile," as distinguished from a random or a cyclical presentation.¹³¹ Mischel's classic studies on resistance to temptation showed that spontaneous attention to enticing stimuli (with a continuous time profile) can undermine goal-achievement.¹³² (We do not know roughly how long it takes for parties in different negotiating contexts to experience this effect, or how this theory brushes up against the effectiveness of "exploding" offers that threaten to expire after a known deadline.) The second prediction is that depleting self-regulation on one issue in dispute might tap out self-regulatory resources for others. For this reason, and as an interesting caveat to (4) above, strategically taking up issues in series might create more wiggle room on the later ones than logrolling several at a time.

(16) Gollwitzer summarizes studies showing that when it comes to accomplishing our goals—either to do something or not—success rates increase when we formulate and share our intentions specific to where, when,

¹²⁹ Mark Muraven & Roy F. Baumeister, *Self-Regulation and Depletion of Limited Resources: Does Self-Control Resemble a Muscle?*, 126 PSYCHOL. BULL. 247, 247–49 (2000).

¹³⁰ Kathleen D. Vohs & Todd F. Heatherton, *Self-Regulatory Failure: A Resource-Depletion Approach*, 11 PSYCHOL. SCI. 249, 249–52 (2000).

¹³¹ Schelling, *supra* note 51, at 106.

¹³² Walter Mischel & Ebbe B. Ebbeson, *Attention in Delay of Gratification*, 16 J. PERSONALITY & SOC. PSYCHOL. 329, 333–37 (1970); Walter Mischel & Charlotte J. Patterson, *Effective Plans For Self-Control in Children*, in 11 MINNESOTA SYMPOSIUM ON CHILD PSYCHOLOGY 199, 201–30 (W. Andrew Collins ed., 1978); Charlotte J. Patterson & Walter Mischel, *Effects of Temptation-Inhibiting and Task-Facilitating Plans on Self-Control*, 33 J. PERSONALITY & SOC. PSYCHOL. 209, 213–17 (1976); Walter Mischel et al., *Delay of Gratification in Children*, 244 SCI. 933, 935–38 (1989).

and how we will implement them.¹³³ Framing these in an if-then format especially helps improve follow-through.¹³⁴

For example, he mentions a study that asked female subjects to do breast self-examinations within the next month. The treatment group was asked to write down when and where they would do this. The control group was not. Those with low motivation to do the task were then winnowed from the total pool of subjects. Almost 100% of the remaining women in the treatment group did the exam. In the control group, only 53% did.¹³⁵

This suggests that if negotiators want to bind themselves to the mast like Odysseus, they should write down when, where, and how they will not wiggle, and they should share this with a confidant or other members of their party. This practice also helps avoid the problem of internalization mentioned above; it is harder to convince someone that his or her self-determined RV was X if he or she can peek at a note saying it was Y, especially because the deliberative process behind writing it probably helped cement a memory of it.

(17) Group dynamics play a role. Consider that a deal below your self-determined RV can appear either riskier than your BATNA, less risky, or equally risky. Some evidence suggests that groups tend to take greater risks than individuals do.¹³⁶ Other studies suggest that individuals' decisions are riskier.¹³⁷ Reconciling these two discrepant sets of studies is a third demonstrating "group polarization"—where group processes exaggerate the aggregate initial leaning of the group.¹³⁸ So, a group decisionmaking process can affect whether a party will wiggle or accept impasse.

¹³³ Peter M. Gollwitzer, *Implementation Intentions*, 54 AM. PSYCHOLOGIST 493 (1999).

¹³⁴ Gabriele Oettingen et al., *Effective Self-Regulation of Goal Attainment*, 33 INT'L J. EDUC. RES. 705, 725–27, (2000) (discussing Experiment 3).

¹³⁵ E.g., Gollwitzer, *supra* note 133, at 496.

¹³⁶ Dorwin Cartwright, *Risk Taking by Individuals and Groups: An Assessment of Research Employing Choice Dilemmas*, 20 J. PERSONALITY & SOC. PSYCHOL. 361 (1971); James Arthur Finch Stoner, *A Comparison of Individual and Group Decisions Involving Risk* (1961) (unpublished M.S. dissertation, Massachusetts Institute of Technology), <http://dspace.mit.edu/handle/1721.1/11330> (last visited Nov. 11, 2010).

¹³⁷ Robert E. Knox & R. Kirk Safford, *Group Caution at the Race Track*, 12 J. EXPERIMENTAL SOC. PSYCHOL. 317, 317–23 (1976).

¹³⁸ Serge Moscovici & Marisa Zavalloni, *The Group as a Polarizer of Attitudes*, 12 J. PERSONALITY & SOC. PSYCHOL. 125, 134 (1969); Dave G. Myers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 PSYCHOL. BULL. 602, 619 (1976).

(18) There has been plenty of research on what makes communications persuasive. For an engaged audience, a longer message is more persuasive when its length owes to strong supporting arguments,¹³⁹ and less persuasive if the length owes to weak or redundant arguments.¹⁴⁰ If you can give a lot of strong and unique reasons for why the other party should wiggle, sharing those improves your chances of wrangling them. A litany of weak reasons reduces those chances.

(19) Inflated self-determined reservation values can lead to wiggling. In a laboratory setting, Pinkley, Neale, & Bennett found that more often than not, people set reservation values for themselves that were much higher than their BATNAs—even when they had no changeover or transaction costs, or a valueless BATNA!¹⁴¹ White and Neale echo Walton and McKersie in reporting that parties sometimes anchor self-determined reservation values on target agreements instead of their BATNAs, confirming Fisher and Ury's fear. Take, "for example, [a party's thought that] 'I would like to get \$50 for my bike, but if I have to, I will settle at \$40.'" White and Neale say:

Within this context, the target (in this case, \$50) is just as important an anchor for the negotiator, if not more so, than the reservation price (\$40). The literature on cognitive anchoring (see Khaneman, Slovic, and Tversky, 1982)¹⁴² argues that individuals will adopt the most salient, available anchor and fail to adjust subsequent judgments adequately away from that anchor. It is easy to imagine that the negotiator's illusions of optimism and control¹⁴³ as well as the overconfidence bias¹⁴⁴ will lead the negotiator to

¹³⁹ See Stephen G. Harkins & Richard E. Petty, *Effects of Source Magnification of Cognitive Effort on Attitudes: An Information-Processing View*, 40 J. PERSONALITY & SOC. PSYCHOL. 401, 412 (1981).

¹⁴⁰ James Friedrich et al., *Argument Integration and Attitude Change: Suppression Effects in the Integration of One-Sided Arguments That Vary in Persuasiveness*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 179, 187–91 (1996). See generally Stephen G. Harkins & Richard E. Petty, *Information Utility and the Multiple Source Effect*, 52 J. PERSONALITY & SOC. PSYCHOL. 260 (1987).

¹⁴¹ Pinkley et al., *supra* note 11.

¹⁴² KAHNEMAN ET AL., *supra* note 115.

¹⁴³ Shelley E. Taylor & Jonathon D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 102 PSYCHOL. BULL. 193, 195 (1988).

¹⁴⁴ Hillel J. Einhorn & Robin M. Hogarth, *Confidence in Judgment: Persistence of the Illusion of Validity*, 85 PSYCHOL. REV. 395, 407–12 (1978).

anchor more heavily on what he or she would like to get (the target) than on what he or she is willing to accept (the reservation price).¹⁴⁵

Wiggle room might therefore be discovered in the 11th hour when anchor-inflated reservation values deflate as parties find themselves stuck between Scylla and Charybdis.

(20) Consider institutional factors.

- a. Let us begin with institutionalized incentive structures—say, for lawyers involved in settlement negotiations over a civil suit. Mnookin et al. point out that since many plaintiff attorneys take a percentage of settlements, a cost-benefit analysis might eventually indicate to them that continued negotiations offer diminishing marginal returns.¹⁴⁶ On the other hand, a defense counsel who is paid by the hour might be incentivized to draw out the negotiation as long as possible,¹⁴⁷ which might mean not wiggling at all. Different incentive structures are part of what Mnookin et al. identify as the tension between principals and agents in negotiations.

Many agents are too selfless to allow such incentive structures to influence them. However, studies show that realtors tend to get higher than average prices when they sell their own homes. Mnookin et al. suggest that this is because the realtors know they will enjoy 100%—not just 5% or 10%—of their additional work's benefit.¹⁴⁸

- b. Wheeler notes that in professional sports negotiations, parties often have interlocking BATNAs because they are bound together contractually.¹⁴⁹ Moreover, negotiations in this context are particularly adversarial, he says, for several reasons: opportunities for creative deal-structuring are limited, salary is the major issue, players associate their salaries with their identity, ambitious agents introduce inflated reservation values,

¹⁴⁵ WHITE & NEALE, *supra* note 13, at 385–86.

¹⁴⁶ MNOOKIN ET AL., *supra* note 57, at 75–76.

¹⁴⁷ *Id.*

¹⁴⁸ R. C. Rutherford et al., *Conflicts Between Principals and Agents: Evidence From Residential Brokerage*, 76 J. FIN. ECON. 627, 641–65 (2005) (suggesting that agent-owned houses sell at a price premium of 4.5%); *see also* Dinah Wisenberg Brin, *Real-Estate Brokers Get a Higher Price When Selling Own Homes, Study Finds*, WALL ST. J., Apr. 19, 1999, at B3E. However, might buyers place a higher value on a house owned by a real-estate agent, because they presume it was chosen, maintained, and priced well?

¹⁴⁹ Wheeler, *supra* note 14, at 245–46.

and comparability (as part of a search for objective criteria) is limited because other players' salaries are not strictly merit-based. Wheeler says that negotiations between players, their agents, and professional sports teams sometimes begin with parties setting reservation values that create NOPA deliberately! He says both sides intend to transform this NOPA into a ZOPA through what I would call wiggling and wrangling.¹⁵⁰

This list of wiggle room's causes could go on and on. Parties' time preferences can change due to mere impatience or low blood-sugar levels. Cultural influences, and logistical constraints on principal-agent negotiations, might matter for wiggle room too.

Let us pause to reflect on how parts of this list have implications for the understandings of reservation values advanced by Fisher and Raiffa. Recall that despite their differences, the locomotive assumption behind both was that cognition precedes behavior. Negotiators' interests are thought to be knowable or discoverable (at least to themselves) and static between the start of bilateral dialogue and the end of the negotiation, so notwithstanding reprioritization of interests during pre-dialogue template creation, Fisher and Raiffa agree that self-discovery and self-analysis about interests should and will precede, rather than follow, consensus or impasse.

I am not confident that the preceding section disproves this—that not just positions at the frontiers of the ZOPA, but interests themselves, are unforeseeably fungible. There is a significant difference between settling for \$2.49 million instead of \$2.5 million, on the one hand, and realizing that you want an apology instead of just money. But by showing us how far we are willing to go to get what we want, wiggling might reveal that we did not rank or weigh our interests accurately—that we got the “expected” part of one or more subjective expected utilities wrong. And perhaps more importantly, parts of the research I have presented highlight the half of the cognition–action feedback loop left underemphasized in Fisher and (especially) Raiffa's brilliant work. The aforementioned discussions of affective forecasting, perceptions of fairness, relationships, identities, uncertainty, regret, negative mood due to difficult choices, and self-control regarding temptation, in particular, suggest that we come to learn how much we really want something by what we do when we negotiate. That is self-discovery *through* negotiation, not just in preparation for it. To the extent that wiggling reveals positions we had previously sworn off, wigglers might be surprised by how important something really is to them, and as John Forester once told me,

¹⁵⁰ *Id.* at 245–47.

surprise “tells you something about how your previous thinking has been limiting you.”¹⁵¹ The next section helps unfold this idea that we might learn some things about ourselves only by observing our negotiation behavior.

VI. HOW WE WIGGLE

In addition to why, there is also the question of how. In particular, if people are tempted to wiggle, what psychological processes facilitate it?

Despite the aforementioned difficulty of distinguishing some instances of calculated wiggling and other RV recalibration, it seems obvious that wiggling can flow from deliberate re-analysis. In such cases, wiggling’s net benefits are reappraised as outweighing that of impasse. Because allowing others to see us cave can work in our favor, in those contexts a cost-benefit analysis can even be said to occasionally tip in wiggling’s favor.

In other cases wiggling just happens. People find themselves wiggling, and then they align their cognitions with that behavior. In such instances, there is a discrepancy between what people intended and what they do. A discrepancy between cognition and behavior is the focus of a well-established body of psychological evidence and theory. At its foundation is Leon Festinger, whose “cognitive dissonance theory”¹⁵² suggests that “a powerful motive to maintain cognitive consistency [between cognition and behavior] can give rise to irrational and sometimes maladaptive behavior.”¹⁵³ Granted, cognitive dissonance theory only applies to wiggling if wiggling can be conceived as a behavior, and only if self-determined reservation values are cognitions that behave like attitudes in some relevant ways. I will assume as much. If wiggling creates an inconsistency between our cognitions and behavior, we might seek to resolve resulting tension by shaping or reshaping our cognitions accordingly.

For example, Festinger and James Merrill Carlsmith found that people sometimes align their attitudes with their behavior *ex post facto* if there is insufficient justification for that behavior.¹⁵⁴ Three findings of this study are

¹⁵¹ Interview with John Forester, Professor of City and Regional Planning, Cornell U., in Cambridge, Mass. (May 15, 2009).

¹⁵² See generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

¹⁵³ BREHM ET AL., *supra* note 62, at 214. This theory would thus label acting before cogitating “irrational and sometimes maladaptive,” adjectives whose pejorative character I do not endorse or dispute in this paper.

¹⁵⁴ Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203, 209 (1959).

particularly worth noting. One is that people can be made to revise their attitudes (and perhaps their reservation values) without even being engaged in direct communication about them. A second is that the study contradicted the commonsense presumption that greater attitude change is elicited by greater rewards.¹⁵⁵ Third, the subjects were not aware of this retroactive change.¹⁵⁶ The implication for wiggle room is that especially when there was weak justification for wiggling, wigglers might delude themselves into thinking that they did not wiggle after all, and that their reservation value was not where it actually was.

Studies have also shown that we change our attitudes after the fact in order to justify our suffering. Elliot Aronson and Judson Mills confirmed what cognitive dissonance theory would predict: investing in something that proves disappointing causes discomfort or anxiety.¹⁵⁷ This can be relieved by adjusting our attitudes. Embarrassment, time, money, and pain are all unpleasant commitments people feel a need to justify.¹⁵⁸ This helps explain how, as noted above, suffering can help cause wiggling. It suggests that people might convince themselves *after* wiggling that their decision to wiggle was a good one, even (or especially) if it involved suffering. Here again, cognition flows from behavior; the tail wags the dog.

In addition to research about justifying attitude-discrepant behavior, there is another branch of cognitive dissonance theory that explains how we justify difficult decisions. After making a difficult choice between two attractive options, people tend to rationalize their choice by exaggerating the positive attributes of the option they chose and the negative attributes of the option they eschewed. Jack Brehm asked female subjects to rate assorted consumer products, ostensibly as part of market research, and then he gave them a choice between two products they had rated evenly.¹⁵⁹ When re-evaluating the products after their choice, subjects revised their evaluations in ways that supported it. What is more, this phenomenon has been observed in numerous contexts. People think it more likely that a horse will win a race after they have placed a bet on it.¹⁶⁰ People are more optimistic about the

¹⁵⁵ BREHM ET AL., *supra* note 62, at 216.

¹⁵⁶ *Id.*

¹⁵⁷ Elliot Aronson & Judson Mills, *The Effect of Severity of Initiation on Liking for a Group*, 59 J. ABNORMAL & SOC. PSYCHOL. 177, 177-80 (1959). However, the desire for group inclusion might not find an analog in negotiations.

¹⁵⁸ BREHM ET AL., *supra* note 62, at 217.

¹⁵⁹ Jack W. Brehm, *Postdecision Changes in Desirability of Alternatives*, 52 J. ABNORMAL & SOC. PSYCHOL. 384, 387 (1956).

¹⁶⁰ Robert E. Knox & James A. Inkster, *Postdecision Dissonance at Post Time*, 8 J.

likelihood their preferred political candidate will win after they have submitted their ballots.¹⁶¹ If wigglers chose a siren song over their BATNA, they might later justify that decision by emphasizing the positive aspects of the siren song and the negative aspects of the BATNA, while de-emphasizing the negative aspects of the siren song and the positive aspects of the BATNA.

Subsequent research re-examining cognitive dissonance found that four conditions are necessary for the arousal of dissonance. After the initial behavior, there must be (1) an unwanted negative consequence;¹⁶² (2) a feeling of personal responsibility, including both a perception of choice¹⁶³ and the foreseeability of the negative consequences;¹⁶⁴ (3) physiological arousal as a reaction to this situation;¹⁶⁵ and finally, (4) the attribution of that physiological arousal to the behavior.¹⁶⁶ All four conditions can surround the act of wiggling, so cognitive dissonance theory is not ruled out. However, we

PERSONALITY & SOC. PSYCHOL. 319, 322 (1968).

¹⁶¹ Dennis T. Regan & Martin Kilduff, *Optimism About Elections: Dissonance Reduction at the Ballot Box*, 9 POL. PSYCHOL. 101, 104–07 (1988).

¹⁶² Joel Cooper et al., *Mistreatment of an Esteemed Other as a Consequence Affecting Dissonance Reduction*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 224, 231–33 (1974). But see Eddie Harmon-Jones et al., *Evidence That the Production of Aversive Consequences Is Not Necessary to Create Cognitive Dissonance*, 70 J. PERSONALITY & SOC. PSYCHOL. 5, 13–15 (1996).

¹⁶³ Darwyn E. Linder et al., *Decision Freedom as a Determinant of the Role of Incentive Magnitude in Attitude Change*, 6 J. PERSONALITY & SOC. PSYCHOL. 245, 252 (1967).

¹⁶⁴ George R. Goethals et al., *Role of Foreseen, Foreseeable, and Unforeseeable Behavioral Consequences in the Arousal of Cognitive Dissonance*, 37 J. PERSONALITY & SOC. PSYCHOL. 1179, 1183–85 (1979).

¹⁶⁵ Roger A. Elkin & Michael R. Leippe, *Physiological Arousal, Dissonance, and Attitude Change: Evidence for a Dissonance-Arousal Link and a “Don’t Remind Me” Effect*, 51 J. PERSONALITY & SOC. PSYCHOL. 55, 65 (1986); Robert T. Croyle & Joel Cooper, *Dissonance Arousal: Physiological Evidence*, 45 J. PERSONALITY & SOC. PSYCHOL. 782, 788–89 (1983).

¹⁶⁶ Mark P. Zanna & Joel Cooper, *Dissonance and the Pill: An Attribution Approach to Studying the Arousal Properties of Dissonance*, 29 J. PERSONALITY & SOC. PSYCHOL. 703, 703–09 (1974); Thane S. Pittman, *Attribution of Arousal as a Mediator in Dissonance Reduction*, 11 J. OF EXPERIMENTAL SOC. PSYCHOL. 53, 61–63 (1975); Mary E. Losch & John T. Cacioppo, *Cognitive Dissonance May Enhance Sympathetic Tonus, but Attitudes Are Changed to Reduce Negative Affect Rather than Arousal*, 26 J. EXPERIMENTAL SOC. PSYCHOL. 289, 300–04 (1990).

must bear in mind that not everyone cares about being cognitively consistent.¹⁶⁷

There have been some important challenges to cognitive dissonance theory. Studies by Daryl Bem suggest that the attitude change results not because of a need to reduce internal tension or justify our action, but because we sometimes infer how we feel from what we have done.¹⁶⁸ Fazio et al. have helped reconcile Bem's explanation with Festinger's. They argue that Festinger-inspired cognitive dissonance theory might be best at explaining situations where there is a high level of discrepancy between attitudes and behaviors, whereas Bem's self-perception theory is better for explaining situations where there is a low level of discrepancy.¹⁶⁹ In terms of wiggling, this discrepancy would be the difference between the revealed and self-determined reservation values. A second challenge to cognitive dissonance theory comes from impression-management theory, which holds that we are motivated to appear but not necessarily *be* consistent.¹⁷⁰ This theory is weakened by countervailing evidence that people change their attitudes to reduce dissonance even when there is no one to make an impression on, such as when attitudes are reported anonymously.¹⁷¹ A third challenge—really more supplemental than oppositional—comes from self-esteem theory, according to which our behaviors can arouse dissonance because they threaten our sense of ourselves, making us feel guilty, insincere, or hypocritical, and motivating us to modify our attitude or behavior.¹⁷² Indeed,

¹⁶⁷ Robert B. Cialdini et al., *Preference for Consistency: The Development of a Valid Measure and the Discovery of Surprising Behavioral Implications*, 69 J. PERSONALITY & SOC. PSYCHOL. 318, 325 (1995).

¹⁶⁸ E.g., Daryl J. Bem, *An Experimental Analysis of Self-Persuasion*, 1 J. EXPERIMENTAL SOC. PSYCHOL. 199, 214–18 (1965).

¹⁶⁹ Russell H. Fazio et al., *Dissonance and Self-perception: An Integrative View of Each Theory's Proper Domain of Application*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 464, 476–78 (1977).

¹⁷⁰ James T. Tedeschi et al., *Cognitive Dissonance: Private Ratiocination or Public Spectacle?*, 26 AM. PSYCHOLOGIST 685, 690 (1971); Roy F. Baumeister, *A Self-Presentational View of Social Phenomena*, 91 PSYCHOL. BULL. 3, 8–11 (1982).

¹⁷¹ Roy F. Baumeister & Dianne M. Tice, *Role of Self-Presentation and Choice in Cognitive Dissonance Under Forced Compliance: Necessary or Sufficient Causes?*, 46 J. PERSONALITY & SOC. PSYCHOL. 5, 12 (1984).

¹⁷² Elliot Aronson, *Dissonance, Hypocrisy, and the Self-Concept*, in COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY 103–26 (Eddie Harmon-Jones & Judson Mills eds., 1999); Jeff Stone et al., *When Exemplification Fails: Hypocrisy and the Motive for Self-Integrity*, 72 J. PERSONALITY & SOC. PSYCHOL. 54, 62–63 (1997).

Claude Steele suggests that a situation that produces dissonance creates a process of self-affirmation to revalidate our sense of ourselves. He says this revalidation can be accomplished in ways other than by resolving the dissonance.¹⁷³ For example, subjects who receive positive feedback about their personality before making a difficult choice are less likely to exhibit a postdecision change in attitudes.¹⁷⁴ If self-affirmation efforts do not take, they will not prevent the arousal of dissonance later.¹⁷⁵ So, wigglers who receive validation are less likely to rationalize later.

If we return to Raiffa and Fisher's treatments of reservation values and zoom out, we see that they emphasize how cognition drives behavior. Studies cited in this last section suggest that sometimes, and to some extent, behavior can drive cognition. We have seen that small payoffs, suffering, difficult decisions, and self-affirmation can all cause the tail to wag the dog.¹⁷⁶ Our descriptive account of reservation values—and the spillover effects on other foundational negotiation concepts like the ZOPA—should reflect that. The wiggle room model can reflect it better than the canonical ones because unlike the latter, it does not mix prescription with description by assuming that self-determined reservation values delimit the realm of possibilities.

VII. CONCLUSION

Glen Beaman joked, "Stubbornness does have its helpful features. You always know what you'll be thinking tomorrow."¹⁷⁷ Wiggle room arises out of the fact that sometimes our revealed reservation values are not what we thought they would be. Viewed from the opposite angle, wiggle room is about being persuasive and getting someone else to acquiesce while claiming

¹⁷³ Claude M. Steele, *The Psychology of Self-Affirmation: Sustaining the Integrity of the Self*, in 21 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 261, 283–302 (Leonard Berkowitz ed., 1988).

¹⁷⁴ Claude M. Steele et al., *Self-Image Resilience and Dissonance: The Role of Affirmational Resources*, 64 J. PERSONALITY & SOC. PSYCHOL. 885, 891, 893 (1993).

¹⁷⁵ Adam D. Galinsky et al., *The Reinstatement of Dissonance and Psychological Discomfort Following Failed Affirmations*, 30 EUR. J. SOC. PSYCHOL. 123, 141–45 (2000).

¹⁷⁶ Organizations rationalize retrospectively, too. Karl E. Weick, *Sources of Order in Underorganized Systems: Themes in Recent Organizational Theory*, in ORGANIZATIONAL THEORY AND INQUIRY: THE PARADIGM REVOLUTION 106, 110–11 (Yvonna S. Lincoln ed., 1985).

¹⁷⁷ WorldofQuotes: Glen Beaman Quotes, www.worldofquotes.com/author/Glen-Beaman/1/index.html (last visited Feb. 9, 2011).

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more for yourself than would seem possible given the parties' self-determined reservation values. I have tried to define wiggle room and discuss its impact on negotiation analysis, including Fisher and Raiffa's dominant but distinguishable approaches to reservation values. I have listed explanations for why and how wiggle room emerges. I have translated these into predictions about what tactics and factors would help negotiators claim the most possible value for themselves, and help prevent counterparts from wrangling them during the distributive bargaining that, at least, closes many negotiations. I have left unanswered such questions as which wrangling or wiggling tactics are unethical, and when it is wise or advisable to wiggle or wrangle. I also have not attempted to analyze how wiggle room theory interacts with some broader concepts like power.

Wiggle room is all around us. It remains to be seen whether we will use it to our advantage, and if we can determine when doing so is appropriate.

